

MV 97-7

Tax Type: MOTOR VEHICLE USE TAX

Issue: Rolling Stock (Vehicle Used Interstate for Hire)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

| | | |
|---------------------------|---|--------------------------|
| THE DEPARTMENT OF REVENUE |) | |
| OF THE STATE OF ILLINOIS |) | |
| |) | NO. |
| |) | IBT |
| v. |) | NTL |
| |) | |
| TAXPAYER, |) | Administrative Law Judge |
| |) | Daniel D. Mangiamele |
| Taxpayer |) | |
| |) | |

RECOMMENDATION FOR DISPOSITION

Appearances:

Gust Dickett, for TAXPAYER; John Alshuler, Special Assistant Attorney General, for the Illinois Department of Revenue.

Synopsis:

This matter comes on for hearing pursuant to the taxpayer's timely protest of Notice of Liability XXXXX issued by the Department on December 29, 1992, for Motor Vehicle Use Tax covering the period September, 1989. The taxpayer, TAXPAYER, is a sole proprietorship in the business of leasing transportation vehicles. The Department conducted an audit of taxpayer's books and records and determined that taxpayer had insufficient documentation to establish that two of its leasing customer, CUSTOMER A and CUSTOMER B were entitled to claim the rolling stock exemption. At issue is the question of whether the taxpayer's oral testimony is sufficient evidence to overturn the Department's *prima facie* case and entitle taxpayer to the rolling stock exemption. Following the submission of all evidence and a review of the record, it is recommended that the issues be resolved in favor of the Department.

Finding of Facts:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence under Certification of the Director of the Correction of Returns, showing a total liability due and owing in the amount of \$21,087.00 and the Notice of Tax Liability. Dept. Grp. Ex. No. 1

2. OWNER is the sole proprietor of TAXPAYER which is in the business of leasing transportation vehicles. Tr. pp. 9, 26

3. OWNER is the secretary-treasurer of CUSTOMER A Tr. p. 26

4. OWNER is president of CUSTOMER B Tr. p. 27

5. The audit period was September, 1989. Dept. Ex. No. 1

6. Taxpayer produced no written documentation to show use of vehicles in question such as Trip Tickets for the audit period. Tr. pp. 21-22

7. Taxpayer produced documentation showing interstate use of the vehicles in the form of Trip Tickets for the years 1992, 1993 and 1995. Tr. p. 21

8. During the years 1992, 1993 and 1995, the trucks in question hauled slag from Portage Indiana to Bollingbrook, Illinois and West Chicago, Illinois. Tr. pp. 22, 31; Taxpayer Ex.'s. No. 14, 15, 16, and 17

9. XXXXX, fleet superintendent for CUSTOMER A, gave oral testimony unsupported by documentation that the trucks in question occasionally hauled lo-boy Trailers to Michigan, Wisconsin and Indiana from 1989 to present. Tr. p. 24

10. OWNER, owner of taxpayer company gave testimony of the exempt use of trucks in question without the support of underlying documentation for the audit period. Tr. pp. 27-33

11. Taxpayer discarded Trip Tickets for 1989 and 1990. Tr. p. 31

Conclusions of Law:

The taxpayer in this matter seeks to establish that they are entitled to a rolling stock exemption on their vehicles. The vehicles were purchased in 1989 but taxpayer was unable to produce any documentation substantiating interstate use of the transportation equipment directly after its purchase and for approximately one year thereafter. Taxpayer, however, did offer oral testimony coupled with documentation in the form of Trip Tickets for the years 1992, 1993 and 1995 establishing the fact that the transportation equipment was used in interstate commerce. Taxpayer only evidence that the same was true for the audit period was oral testimony from the taxpayer and the fleet superintendent for one of the subleasees.

In Illinois pursuant to the Use Tax Act 35 ILCS 105/3 in which the Director of Revenue assessed Use Tax against the taxpayer herein provides in pertinent part as follows:

Section 3 tax imposed. A tax is imposed on the privilege of using in this State tangible personal property purchased at retail from a retailer....

35 ILCS 105/2 of the Use Tax Act defines the "use" of tangible personal property as follows:

"Use" means the exercise by an person of any right or power over tangible personal property incident to the ownership of that property....

86 Ill. Admin. Code ch. 1, Sec. 150.305(e) provides as follows:

e) the Use Tax does not apply to the rental payments made by a lessee to a lessor. However, except as is noted in Section 150.306

of this part, the lessor is legally the user of the property and is taxable on the purchase price thereof.

The case of Philco Corp. v. Department of Revenue, 40 Ill. 2d 312, (Fourth Dist. 1968) stands for the proposition that the lessor of tangible personal property "uses" that property within the meaning of the Use Tax Act, so as to incur liability for payment of .

Pursuant to the above statutes, applicable regulations, and relevant case law cited above, the lessor of tangible personal property is deemed to be the user of the leased property and is, therefore, responsible for the payment to the Department of Use Tax. The amount of which is determined by applying the appropriate tax rate to the selling price of the property being leased. Conversely, pursuant to the holding in International Business Machine Corp. v. Department of Revenue, 25 Ill. 2d 503:

the lessee of tangible personal property is not taxable under the Use Tax Act. Under circumstances where a purchaser of tangible personal property provided his seller with a proper rolling stock affidavit, the seller would be relieved of any responsibility to remit tax with respect to the sale of the property alleged to qualify for the exemption. In Illinois because the lessor is deemed to be the user of the property, the provisions of a rolling stock affidavit by his lessee cannot have the same effect. Therefore, the lessor remains responsible for the payment of tax if the Department looks behind the rolling stock affidavit and determines that the lessee is not entitled to the exemption,

In the instant case the taxpayer has been unable to supply any documentation substantiating the use of the transportation equipment directly after its purchase and for a period of approximately one year thereafter. Taxpayer argued that the oral testimony adduced if uncontradicted must be taken as true unless impeached by other testimony or circumstances, or found to be inherently improbable. In support of taxpayer's argument they cite Bucktown Partners v. Sariah Johnson, 119 Ill. App. 3d 346, (1st Dist. 1983) and the people ex rel. Ida Brown v. Ronald Booker, 88 Ill. 2d 81 (4th Dist. 1981), 89 Ill. App. 3d 1207 (1981). I find these case not applicable to the factual

situation before us, since there is a statutory presumption of correctness when the Department introduces it *prima facie* case. The Department under the certification of the Director introduced its *prima facie* case. The amount of tax and penalty established is deemed *prima facie* true and correct. The Department having established its case, the burden then shifted to the taxpayer to overcome it by producing competent evidence as identified with taxpayer's books and records. Masini v. Department of Revenue, 60 Ill. App. 3d 11, (1st Dist. 1978).

In this matter, no documentary evidence was proffered to rebut the *prima facie* case. I find the oral testimony alone was not sufficient to explain the use of the vehicles during the audit period. In the case of A. R. Barnes and Company v. Department of Revenue, 173 Ill. App. 3d 826 (1st Dist. 1988), the court held the *prima facie* case cannot be overcome by merely denying the accuracy of its assessments, instead, evidence must be presented which is consistent, probable, and identified with its books and records. Further, in First National Leasing & Financial Corp. v. James B. Zagel, 80 Ill. App. 3d 358 (Fourth Dist. 1980) and Sprague v. Johnson, 195 Ill. App. 3d 798 (Fourth Dist. 1990), the court stated oral testimony is not sufficient to meet taxpayer's burden of proof that the Department properly imposed Use Tax on the purchase of trucks because trucks were used in interstate commerce. Documentary proof is required to prevail against an assessment of tax Deficiency by the Department.

Lastly, it is incumbent upon the taxpayer, if he is to claim an exemption, to maintain and keep records to substantiate the use of the vehicles. Here, taxpayer testified he discarded his records after an audit, but produced no evidence of the audit or what the audit encompassed.

35 ILCS 120/7 states in pertinent part as follows:

Every person engaged in the business of selling tangible personal property at retail in this State shall keep records and books of all

sales of tangible personal property, together with invoices, bills of lading, sales records, copies of bills of sale, inventories prepared as of December 31st of each or otherwise annually as has been the custom in the specific trade and other pertinent papers and documents...

It Shall be presumed that all sales of tangible personal property are subject to tax under this Act until the contrary is established, and the burden of proving that a transaction is not taxable hereunder shall be upon the person who would be required to remit the tax to the Department if such transaction is taxable. (Emphasis Added)

There was no documentation associated with taxpayer's evidence to support his oral testimony for the audit year in question. Once taxpayer purchased the trucks, it became liable for Use Tax on the cost of the transportation equipment which it leased to its lessees.

Based on all the testimony and evidence, I find, that taxpayer did not rebut the Departments' *prima facie* case by offering documentation substantiating the use of the transportation equipment after its purchase, therefore, I recommend that the taxpayer should be responsible for the payment of Use Tax as applied to the purchase price paid by the lessor for the transportation vehicles and a final assessment should be issued accordingly plus penalties and interest to date.

Daniel D. Mangiamele
Administrative Law Judge